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STATE OF MINNESOTA  
IN SUPREME COURT

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**In the Matter of the Welfare of the Child of G.W. and T.T.B., Parent**

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**APPELLANT HENNEPIN COUNTY'S BRIEF AND APPENDIX**

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LEONARDO CASTRO  
Chief Fourth District Public Defender

By: PETER W. GORMAN  
Assistant Public Defender  
Atty. License No: 3633X  
317 Second Ave S, Ste 200  
Minneapolis, MN 55401  
Phone: 612-348-6618  
*Counsel for Respondent G.W.*

GUY-URIEL E. CHARLES  
Atty. License No P59010-MI  
THOMAS J. VOLLBRECHT  
Atty. License No. 17885X  
FAEGRE & BENSON, L.L.P.  
2200 Wells Fargo Center  
90 S 7<sup>th</sup> Street  
Minneapolis, MN 55402  
Phone: 612-766-6986  
*Counsel for Respondent Yankton Sioux  
Tribe*

AMY KLOBUCHAR  
Hennepin County Attorney

By: MARY M. LYNCH  
Assistant County Attorney  
Atty. License No: 259366  
525 Portland Ave S, Ste 1210  
Minneapolis, MN 55415  
Phone: 612-348-6947  
Fax: 612-348-9247  
*Counsel for Appellant Hennepin County  
Human Services and Public Health Dept*

JONATHAN G. STEINBERG  
Atty. License No: 104851  
412 S 4<sup>th</sup> Street, Ste 1155  
Minneapolis, MN 55415  
Phone: 612-344-1560  
*Counsel for Guardian ad Litem*

JACQUELINE M. BEAULIEU  
Atty. License No: 293088  
INDIAN CHILD WELFARE LAW CTR  
1113 E Franklin Ave  
Minneapolis, MN 55404  
Phone: 612-879-9165  
*Counsel for Mother T.T.B.*

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## LEGAL ISSUES

### I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTIONS TO TRANSFER JURISDICTION TO TRIBAL COURT?

The Court of Appeals held the trial court abused its discretion.

*Authorities:*

25 U.S.C. §1911(2002).

Minn. Stat. §260.751 et seq (2004).

Minn. Stat. §260C.201 (2004).

## STATEMENT OF FACTS AND OF THE CASE

On November 15, 2003, the child X.T.B. was born in Rhode Island. *Exhibit 8 at 6*. X.T.B.'s mother and father, T.T.B. and G.W., had traveled together to the Rhode Island home of A.G.M. and N.M. in the weeks prior to the child's birth. *Exhibit 8 at 6; Exhibit 11*. T.T.B. was seventeen years old at the time and had been living in a facility for teenagers in Minnesota while her first child, A.G., was in foster care placement. *Exhibit 7 at 1; Exhibit 8 at 6; Appendix at 34*. A.G. was the subject of a permanency petition filed by the Hennepin County Human Services Department ("HSD" or "Hennepin County"). *T 2 at 3.*<sup>1</sup> The Hennepin County trial court with ongoing jurisdiction over T.T.B. through A.G.'s child protection case plan did not know of T.T.B.'s pregnancy. *App. at 34*. The trial court held T.T.B. in default on Hennepin County's petition to terminate her parental rights as to A.G. on November 10, 2003. *App. at 21*. T.T.B. ultimately voluntarily terminated her parental rights to A.G. in March 2004. *T2 at 7*.

Statements made by T.T.B. while in hospital following X.T.B.'s birth raised suspicions and within days child protection officials in Rhode Island removed the child from T.T.B.'s care. *Exhibit 8 at 6*. Hennepin County child protection was notified and Hennepin County asserted jurisdiction over X.T.B, filing an amended petition on November 21, 2003. *App. at 13, 21*. After proceedings in Rhode Island the child was transferred to Minnesota. *Exhibit 8 at 6*. On December 23, 2003, the trial court made findings that the amended petition before it established a prima facie showing that a child

protection matter existed as to the child X.T.B. *App. at 15, 20*. With permission of the court, Hennepin County HSD subsequently removed X.T.B. from the amended petition and filed a new petition naming X.T.B. alone. *App. at 20*. The trial court issued a new order incorporating the initial findings under the new petition number. *App. at 20*. The new petition requested termination of parental rights or transfer of permanent legal and physical custody as alternative forms of relief. X.T.B. was placed with S.G., foster care provider and paternal grandmother of X.T.B.'s half-sibling, A.G. *Exhibit 9 at 1*.

T.T.B. is a member of the Pine Ridge Oglala Sioux Tribe. *T2 at 2-3*. G.W. is a member of the Yankton Sioux Tribe. *Exhibit 1*. Both tribes received notice of the permanency petition in January of 2004. *App. at 30; see also Exhibit 5; T2 at 2; T3 at 2*. The Yankton Sioux Tribe supported permanency. *Exhibit 5*. Hennepin County contacted both tribes at the time X.T.B.'s initial placement in the home of S.G. *Exhibit 9 at 1*. Neither tribe challenged the placement. The Yankton Sioux Tribe went forward as the child's tribe. *Exhibit 5*.

Appellant G.W. made an initial appearance at a February 2004 hearing and was assigned counsel. *App. at 34*. In March 2004, Minnesota initiated a home study of the home of A.G.M. and N.M., the parents' preferred placement resource, as required under the Interstate Compact on the Placement for Children. *Minn. Stat. §260.851; Exhibit 8*. The Rhode Island Department of Children, Youth, and Families denied the proposed placement with A.G.M. and N.M. *Exhibit 8 at 9*. The Rhode Island Department stated that the decision was based on a number of factors including the manner in which the

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<sup>1</sup> T2 refers to the second volume of the separately paginated transcripts of the proceedings held before the Hon.

child X.T.B. first came into contact with the Rhode Island child protection system just after his birth. *Exhibit 8 at 9.*

X.T.B. remained in the home of S.G. throughout the proceedings. Hennepin County also considered B.W., paternal grandmother, as a placement resource and the primary social worker made a pre-licensing visit to her home in May 2004. *Exhibit 9 at 2.* B.W. was excluded as a placement resource, in part because Appellant G.W. lived in her home at that time. *Exhibit 9 at 2.* B.W. was offered visits with X.T.B. and did not take any advantage of independent visits or make other inquiries about X.T.B. *Exhibit 9 at 2.*

A trial date of July 22, 2004 was set after an April motion hearing. *T3 at 10, T4 at 3.* The parties appeared at a June 10, 2004 pre-trial and discussed the fact of opposing transfer of legal custody issues. *T4 at 3-4.* The trial court issued a scheduling order. *Order filed 6/11/2004.* G.W.'s counsel requested new deadlines for pre-trial motions and filings. *App. at 36.* The trial court then issued an Amended Scheduling Order setting July 22, 2004 as the date for all pleadings, lists, and pre-trial motions to be submitted. *App. at 37.* Pursuant to that order, new trial dates were set for October 2004, with October fifth for evidentiary issues and a prior hearing in August to address the motions to dismiss and transfer jurisdiction. *App. at 37; T5 at 2, 4.* Hennepin County filed an amended petition adding additional facts. *App. at 38.*

On July 22, G.W. filed a motion seeking dismissal or transfer of jurisdiction to tribal court. The parties appeared on August 12, 2004 on the request by the parents for a

transfer of jurisdiction to tribal court and on G.W.'s motion to dismiss. *T5 at 1-3*. The Yankton Sioux Tribe did not appear. *T5 at 2*. The trial court denied the motion to dismiss. *T5 at 12*. The trial court deferred ruling on transfer of jurisdiction to allow the Tribe another opportunity to express its position. *T5 at 13*. The Tribe filed a request to transfer jurisdiction on September 24, 2004.

On October 5, 2004, the parties appeared and argued the transfer of jurisdiction motions. *T6 at 1-2*. Hennepin County stated that its objective was to reach a permanency decision and did not take a position on transfer to tribal court. *T6 at 5*. The Yankton Sioux Tribe's ICWA Director testified in support of the Tribe's request for a transfer of jurisdiction. *T6 at 4*. trial court informed the parties by phone on October 15, 2004 that it had denied the transfer of jurisdiction requests and later filed a written order on the issue. *App. at 48*. No party sought immediate review of this order.

The parties proceeded on a primarily stipulated facts trial on October 27, 2004 as to the different proposed transfers of legal custody. The Tribe supported a transfer of custody to B.W. *T7 at 19*. Counsel for both parents argued primarily for a transfer to A.G.M. and secondarily to B.W. *T7 at 23-26*. The Department and Guardian ad Litem supported a transfer of legal custody to S.G.

The trial court transferred permanent physical and legal custody to S.G. Following post-trial proceedings, G.W. and the Yankton Sioux Tribe appealed the result. The Court of Appeals held the Hennepin County trial court had proper personal and subject matter jurisdiction, but that the transfer of jurisdiction was an abuse of discretion rendering other trial court actions invalid. The court remanded the case to juvenile court

for transfer of jurisdiction to tribal court. Hennepin County and the Guardian ad Litem sought review by this Court which was granted on May 16, 2006.

## ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOTIONS TO TRANSFER JURISDICTION TO TRIBAL COURT.

#### A. Introduction.

Child protection law in Minnesota occurs within a complete framework provided by statutes and court rules. A child in placement may either be the subject of a petition alleging him in need of protection and services or a permanency petition. *Minn. Stat. §260C.178, subd. 1; §260C.201, subd. 11, subd. 11(a)(2004).*<sup>2</sup> A petition alleging a child is in need of protection or services is not required prior to the filing of a petition seeking permanency. *Minn. R. Juv. P. 40.03 (2004)*. The operative timelines are formed by the child's time in court-ordered placement. *Minn. Stat. §260C.201, subd. 11(a); Minn. R. Juv. P. 40.03, subd. 2; Minn. R. Juv. P. 67; Minn. R. Juv. P. 77.01, subd 1*. For a child under the age of eight, the trial court must conduct a permanency hearing no later than six months after out of home placement. *Minn. Stat. §260C.201, subd. 11(a)*. If a child cannot be in a parental home in the reasonably foreseeable future, permanency proceedings to free the child for adoption or transferring legal and physical custody to a relative take place. *Minn. Stat. §260C.001, subd 3*. Moreover, when a permanency petition is filed, a trial must be commenced within ninety days. *Minn. R. Juv. P. 40.03, subd. 3*.

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<sup>2</sup> This brief refers to Minnesota Statutes and Minnesota Rules of Juvenile Procedure of 2004, the year in which the primary orders issued. The Rules of Juvenile Procedure have since been renumbered and those regarding Juvenile

The framework created by the Indian Child Welfare Law Act and state law for child protection matters is well settled. The federal Indian Child Welfare Law Act (“ICWA”) generally applies to child protection proceedings involving an Indian child. 25 U.S.C. § 1903 (2002). The ICWA’s goal is to “...protect the best interests of Indian children and to promote the stability and security of Indian tribes and families...” by establishing baseline standards for removal of children from their families as well as placement by state courts. 25 U.S.C. § 1902. A core feature of the ICWA is the role of tribal court jurisdiction. 25 U.S.C. § 1911; *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). The ICWA is supreme in child protection matters unless state law provides a higher level of protection consistent with the goals of the ICWA. 25 U.S.C. § 1921. Minnesota law follows the ICWA and in some cases provides additional protections in support of the ICWA’s goals of family and cultural preservation. *Minn. Stat. §260.751-§260.835 (Minnesota Indian Family Preservation Act)*; *Minn. Stat. § 260C.001, subd. 3, § 260C.168*; see also *Welfare of B.W.*, 454 N.W.2d 437, 443-44 (*Minn. App. 1990*).

Children considered “Indian children” under the ICWA not living on a reservation are subject to concurrent state and tribal court jurisdiction. *Miss. Band of Choctaw*, 490 U.S. at 36. A transfer of proceedings from state court to tribal court shall occur on request of a proper party absent the objection of a parent, declination of the tribe, or good cause to the contrary. 25 U.S.C. § 1911(b). This effectively creates a preference for tribal court jurisdiction upon request unless an exclusion condition is met or a trial court

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Protection are now known collectively as the Rules of Juvenile Protection Procedure; the renumbering did not

finds good cause to the contrary. *Miss. Band of Choctaw*, 490 U.S. at 36; see also, *In the Interest of J.W.*, 528 N.W.2d 675 (Iowa App. 1995); *In the Matter of the Dependency and Neglect of A.L.*, 442 N.W.2d 233 (S.D. 1989).

The child in this matter, X.T.B., clearly comes within the ICWA and all parties treated him as such throughout the proceedings. G.W., X.T.B.'s father, did contest jurisdiction at the trial level, most clearly on subject matter jurisdiction as to G.W. The Court of Appeals analysis addressed the issues of jurisdiction, holding that G.W. had waived objections to personal jurisdiction and that subject matter jurisdiction was proper. The Court of Appeals held that the trial court had abused its discretion concerning the parents' and tribe's motions or requests for transfer to tribal court. The opinion held other trial court actions invalid as a result. Neither the father nor the Tribe has sought review on other issues. Hennepin County contends the trial court's decision as a whole is supported by clear and convincing evidence in the record and does not intend to waive any other issues.

**B. State Courts May Deny Requests To Transfer Jurisdiction to Tribal Court In The Presence Of Good Cause.**

In light of the preference for a transfer of jurisdiction, when considering a challenge to transfer, a state trial court must consider whether "good cause to the contrary" exists. On review of a trial court's decision on this issue, the appellate court applies an abuse of discretion standard. See *In re S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994); *Welfare of the Children of C.V.*, 2004 WL 2523127 \*2-3 (Minn. App., Nov. 9,

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substantively affect the issues in this case.

2004). Neither the ICWA nor Minnesota statutes provide a definition of “good cause to the contrary”. Courts and practitioners frequently refer to the Guidelines for State Courts; Indian Child Custody Proceedings, §C1 et seq, 44 Fed Reg. 67584, 67591 (1979) (hereinafter “BIA Guidelines” or “Commentary”), for interpretative guidance on the ICWA. See *Batterton v. Francis*, 432 U.S. 416, 424 (1977). Minnesota Courts routinely rely on the BIA Guidelines when considering questions of law not met by the ICWA on its face. *In the Matter of S.N.R.*, 617, N.W.2d 77, 81 (Minn. App. 2000).

The BIA Guidelines places the burden on the party opposing the transfer, consistent with the preference tribal jurisdiction. *BIA Guidelines, C.3(d)*:

- (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- (ii) The Indian child is over twelve years of age and objects to the transfer.
- (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- (iv) The parents of a child over five years of age are not available and the child has had little or not contact with the child’s tribe or members of the child’s tribe.

*BIA Guidelines C.3(b)*, 44 Fed. Reg. at 67591. This framework in some ways creates a modified forum non conveniens doctrine to effectively consider the rights of the Indian child, parents, and tribe. *In re Dependency of E.S.*, 92 Wn.App. 762, 770, 964 P.2d 404 (1998).

An appellate court reviews a transfer of legal custody order in a child protection matter to determine whether the trial court's findings address the statutory criteria and are supported by substantial evidence, or whether they are clearly erroneous. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990); see also *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 261 (Minn. App. 1996). The court's factual findings must be clearly erroneous, manifestly contrary to the weight of the evidence, or not reasonably supported by the evidence as a whole to warrant reversal. *Id.*; see also *Vangness v. Vangness*, 607 N.W.2d 468, 474 (Minn. App. 2000). The petitioner must prove the petition by clear and convincing evidence. *Minn. R. Juv. P. 74.04* (2004); see also *Welfare of the Child of T.L.C.*, A05-922, 2005 WL 3112019 at \*3 (Minn. App. 11/22/2005). Evidence and reasonable inferences are viewed in the light most favorable to the prevailing party. See *A.R.G.-B.*, 551 N.W.2d at 261.

**i. Good cause to deny transfer involves a case by case analysis.**

Courts agree that consideration of whether good cause exists to deny a request for transfer of jurisdiction occurs on a case by case basis. See *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 163 (Tex. Ct. App. 1995). South Dakota explicitly considers cases based on time of request on the facts of each specific case. *In re A.L.*, 442 N.W.2d 233, 236 (S.D. 1989). The Iowa Court of Appeals examined a proceeding involving a combined issue of transfer motions and trial on terminations of parental rights litigated at the same time. *In re J.W.*, 528 N.W.2d 657, 660 (Iowa Ct. App. 1995). The children involved had been involved in child protection proceedings over a number of years. 528 N.W.2d at 658-59. A second termination petition was filed, in part to satisfy the notice

requirements of the ICWA. *Id.* Approximately seven months after the permanency petition was filed, the Tribe and a child sought transfer of jurisdiction. *Id.* The Iowa court held the facts sufficient for the trial court to conclude the proceedings were at an advanced stage and that the petitioners had not filed promptly, supporting good cause to deny transfer of jurisdiction. *Id. at 660-61.*

Other courts have endorsed either implicitly or explicitly the case by case analysis. Key is the trial court's understanding of the overall preference for tribal court jurisdiction as well as the need to establish good cause. The trial court engages in a level of discretionary decision-making, but does so within a clearly defined framework that creates a unique accountability. The BIA Guidelines and Commentary, along with case law, thus creates a flexible analytical structure that gives primacy to the values of the ICWA while allowing state trial courts some discretion within the defined framework.

**ii. This case was at an advanced stage of proceedings.**

Minnesota law clearly prioritizes timely resolution of child protection matters. Statutes and rules create a unique obligation on the trial court and the social service agency to file petitions regarding permanency, including requiring filing permanency petitions no later than a specified period of time after a permanency hearing. *Minn. Stat. §260C.201, subd. 11(a); Minn. R. Juv. P. 74.02, 77.04.* Once a child is in placement, a permanency hearing regarding a child under the age of eight must occur within six months. *Minn. R. Juv. P. 74.02, subd. 1(b).* Filing a permanency petition also fulfills a substantial portion of the social service agency's obligations prior to a permanency hearing. *Minn. R. Juv. P. 77.04, subd. 1(a).* The Rules of Juvenile Procedure call for

trial on a petition seeking transfer of physical and legal custody within thirty days of filing a petition and within ninety days of filing a termination of parental rights petition .  
*Minn. R. Juv. P. 74.02, subd. 1(b).*

This Court has made the concept of timely proceedings as vital to serving the best interests of the child a cornerstone of Minnesota child protection law. In 2003, the Court considered an argument to allow relief from application of normal rules of appellate procedure. *In the Matter of the Welfare of J.R., Jr., 655 N.W.2d 1, 4-5 (Minn. 2003).* The Court held that serving the unique situation of children in protection cases specifically requires adherence to procedures designed to ensure prompt attention to all procedural requirements in order to meet the special interests of children subject to protection proceedings. *655 N.W.2d at 5-6.*

Other cases also teach that child protection cases must be carefully but strictly structured to prioritize time-effective procedures in the goal of reaching permanent resolutions. Recently, in *Welfare of T.A.A.*, this Court focused the timeframe of analysis to include only core issues of a case, effectively supporting timely decision-making. *702 N.W.2d 703, 709-10 (Minn. 2005).* In *Welfare of Children of Coats*, this Court considered a parent's failure to take timely actions as crucial in rejecting her claim for relief. *633 N.W.2d 505, 509-11 (Minn. 2001).* In *Matter of Welfare of J.M.*, the Court created an effective timeframe for analysis within the continuum of children's lives by rejecting a need to prove future prospects for adoption at the time of the termination of parental rights trial. *574 N.W.2d 717, 723 (Minn. 1998).* These cases share a central concern for

considering time as experienced by the child and for making decisions about permanency in as time-effective a way as possible while respecting the rights of those involved.

The ICWA does not prohibit taking time into account. The BIA Guidelines specifically direct consideration of the duration and stage of the proceedings. The Guideline's primary language of considering advanced proceedings clearly focuses on the time of the court proceedings. *Guidelines C.1.* The Commentary clarifies the ground exists to encourage prompt filings to transfer jurisdiction. *Commentary C.1.* In addition, the Commentary specifically states that the timeliness ground for good cause seeks to avoid unnecessary delay, acknowledging that "[l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." *Commentary C.3.*

This focus on time as experienced by the child is consistent with the development of child protection law in Minnesota. *J.R., 655 N.W.2d at 5.* In addition, Federal Rules, in effect after the enactment of the ICWA, consider both time and whether reunification services are applicable in defining the stage of a child protection case. *See generally 45 CFR §1356.21(g) and (h)(2000).* The trend in child protection law is to move as efficiently as possible to permanent determination regarding child.

Some cases from other states involving denial of a request to transfer involve cases that appear to involve longer proceedings. The need to make a case by case analysis, however, clearly calls for an examination of the particular characteristics of each particular case. The case at hand has several unique characteristics in the context of national cases. First, this matter was filed as a permanency petition. Second, the Tribe

clearly had actual notice from an early stage and did not contest the validity of formal notice. *T6 at 4, Exhibit 5; Exhibit 9 at 1; App. at 30.* Third, and perhaps most importantly, this case centered on decision-making regarding X.T.B.'s permanent, non-parental home from the early stages. G.W. primarily sought placement with A.G.M. and N.M., a position the Tribe supported until the actual trial. *Exhibit 7.* At the time of the requests for transfer, and certainly when the trial court made its decision on transfer to jurisdiction in October 2004, the issue was not whether the child would be with a parent but into which home he would be placed permanently through court order.

The ICWA does not require transfer of jurisdiction of children not domiciled on the reservation. It clearly creates a preference for jurisdiction in tribal court, enhanced by requiring a party opposing transfer to bear the burden of establishing good cause to deny a transfer. Allowing state trial courts flexibility to consider the stage of proceedings, and requiring prompt requests for transfer, recognizes an important value articulated in Minnesota law, that of the need for time efficient decision-making in child protection cases. When a court, as did the trial court did here, ensures notice and participation of tribes and other parties and engages in a careful consideration of the issues within the framework provided by the ICWA and the BIA Guidelines, the ICWA is not violated.

Allowing a state court to retain jurisdiction due to the stage of the proceedings does not violate the ICWA. As interpreted by the BIA Guidelines and Commentary, the ICWA allows a consideration of the duration of the proceedings to inform the analysis of whether good cause exists. Minnesota law requires permanency decision-making to be underway by six-months of out of home placement. Since the ICWA allows duration of

proceedings to be a consideration in combination with the actions of the parties involved, in part due to the impact on the child, state law timelines created for those same purposes are consistent with the ICWA. The Court of Appeals erred in finding that the trial court abused its discretion when it applied the state permanency timelines framework.

**C. The Proceedings In This Case Were At A Sufficiently Advanced Stage To Deny Transfer Given The Actions Of The Parties.**

On the specific facts of this case, compelling grounds to find a good cause to deny transfer exist. At the time of the father's motion in July 2004, X.T.B. had been in placement in Minnesota for over six months, in addition to the time in Rhode Island, and by the time the Tribe requested transfer the child had been in a Minnesota placement for nine months. Both the parents and the Tribe had received both actual and formal notice well before the request for transfer.

The BIA Guidelines call for prompt action to seek a transfer of jurisdiction, particularly when the proceedings are advanced. *BIA Guidelines C.1.Commentary*. Neither the parents nor the Tribe sought a transfer until after substantively engaging in the state court process, including a Family Group Conference. The initial transfer request from G.W. came only after a trial continuance created by his counsel's request for additional time to comply with pre-trial orders. Waiting until after that point to seek transfer is far from prompt. The Tribe's request, two months later and after the time initially requested by the trial court, sets an even later point of analysis.

Respondents, perhaps as well as the Court of Appeals, confused the issue of timeliness of pre-trial motions and promptness within the meaning of the BIA Guidelines.

In response to a request by G.W.'s counsel for an extended timelines for discovery and pre-trial motions, the trial court issued an amended scheduling order calling for all pre-trial motions to be submitted July 22, 2004. G.W.'s motion, filed on July 22, 2004, thus was timely within a limited procedural sense. The trial court also specifically requested the Tribe to formally state its position through a motion or other papers, and the Tribe ultimately made that request.

This deference to the Tribe, and the willingness to hear the father's motion, does not mean the trial court considered the motions prompt within the meaning of the BIA Guidelines. The trial court may or may not have considered them timely in the sense of trial procedure, but the trial court did its duty in addressing the issues presented by the motions due to the important concern of jurisdiction within the ICWA. Indeed, the trial court would have been remiss had it refused to consider the motions; the ICWA and the BIA Guidelines clearly require a substantive consideration of any request for transfer of jurisdiction. The Court of Appeals' suggestion that the trial court's failure to deem the motions untimely contradicts a finding related to the stage of the proceedings overall thus misunderstands both the nature of the trial court's duty and the obligations of the parties in a case within the ICWA.

In addition, Respondents implicitly argued at the Court of Appeals that because the case opened in permanency due to the mother's child protection status with an earlier ongoing case, G.W. should not be held accountable to the permanency timelines. This stance ignores the fact that the child was in placement for over six months by the time the request was made. Neither G.W. nor the Tribe presented initially as desiring transfer to

tribal court. In addition, G.W.'s primary goal throughout the case was to obtain a permanency placement with A.G.M. and N.M., rather than gain custody himself, a goal that the Tribe supported through the transfer motion.

This record provides convincing support for the trial court's decision. The record clearly shows that the Tribe and parents had notice of the proceedings as well as the nature of the focus on permanency away from the parents' care. The record shows that neither parent nor the Tribe moved for transfer until after months of placement and until the case was on the verge of trial in state court. This combination creates solid support for the trial court's decision that good cause existed.

The parents, with the support of the Tribe, were forthright in their primary desire to obtain a permanent home for X.T.B. with A.G.M. and N.M. They could have pursued that goal in tribal court from the opening stages. They engaged in the state system for a substantial period of time, however, and neither they nor the Tribe sought transfer promptly after receiving notice and service of the petitions. The trial court did not err in finding that the Guardian ad Litem had shown good cause to deny transfer.

**D. The Court Of Appeals Holding Creates Invidious Incentives For Delay.**

The Court of Appeals' holding creates incentives for delay in child protection cases with the ICWA. First, the court ignored the fact the permanency proceedings were ready for trial, indeed that trial had already been continued once. Second, the court placed significant emphasis on the fact that Hennepin County filed an amended petition.

The amended petition did not change the case or the issues involved at the time G.W. made his transfer request. Amended petitions are permissible under the Rules of

Juvenile Procedure. *Minn. R. Juv. P. 70.04*. The amended petition in this case added only additional facts about G.W.'s case plan activities. The amended petition did not change the issues litigated and did not change the relief sought by the petitioner in trial court. The parents continued to seek placement with A.G.M. and N.M., and petitioner Hennepin County continued to seek permanency placement with S.G., the grandmother of X.T.B.'s half-sibling.

The Court of Appeals' faulty analysis links the definition of advanced stage of the proceedings to procedural motions. This creates harmful incentives for parties to file a petition, or to force an amended petition through any number of routes, and thus create significant delay. This result is at odds with both state law and the ICWA as both sets of statutes clearly prioritize time-efficient decision-making regarding children in protection cases.

The Court of Appeals holding also creates an unnecessary conflict between state permanency timeframes and cases within the ICWA. The concepts of prompt action and consideration of the stage of the protection proceedings embody a concern for timely procedures in protection cases. This concern clearly exists as well within the state law. The federal and state laws can thus be read in harmony. Instead, the Court of Appeals ignores both the state law and the BIA Guidelines counsel. The court's holding does not offer clear guidance as to when or how to consider those concepts. The holding thus creates uncertainty in future practice, creating the probability of future litigation. This in turn gives any party the ability to merely delay a child protection case rather than engage as soon as possible.

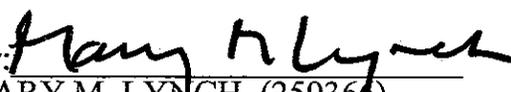
The Court of Appeals holding also encourages forum shopping. The parents and Tribe engaged in trial court proceedings until the very point of the permanency trial before seeking to transfer jurisdiction to tribal court. This case does not present issues of late notice to a parent or tribe, and does not involve a sudden change of substantive facts or issues. Although the parents and the Tribe supported permanent placement with A.G.M. and N.M., neither requested a change in placement of X.T.B. until the actual trial. Finally, it is of note that the parties actually litigated the trial and awaited the final result before seeking reversal on the transfer of jurisdiction issue. The trial court's order denying transfer was a final order and thus subject to appeal. *Minn. R. Juv. P. 82.02*. Reversing on the transfer issue after trial in state court clearly runs counter to the structure of the BIA Guidelines and thus is an appropriate consideration on appeal. *BIA Commentary C.1*.

## CONCLUSION

The record provides ample support for the trial court's determination that good cause exists to deny transfer to tribal court. The trial court's decision to transfer legal custody was carefully reasoned and fully supported by the record. Appellant Hennepin County requests this Court to reverse the Court of Appeals and allow the trial court's order to stand or, in the alternative, to reverse and remand to the Court of Appeals for consideration of other issues presented to it.

Respectfully submitted,

AMY KLOBUCHAR  
Hennepin County Attorney

By:   
MARY M. LYNCH (259366)  
Assistant County Attorney  
Health Services Building  
525 Portland Avenue, Suite 1210  
Minneapolis, MN 55415  
Telephone: (612) 348-6947  
Fax: (612) 348-9247

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).